

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JAMES CHAVEZ,

Petitioner,

v.

LeGRAND, WARDEN, et al.,

Respondents.

Case No. 3:13-cv-00548-MMD-WGC

ORDER

This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by James Chavez. On September 14, 2014, respondents filed a motion to dismiss arguing that Ground 2 of Chavez's petition is unexhausted.¹ (Dkt. no. 26.) Having been fully briefed, the motion is now before the Court for decision.

I. BACKGROUND²

In November 2006, a jury in the Second Judicial District Court for Nevada found Chavez guilty of four counts of sexual assault on a child. The state district court sentenced him to four consecutive terms of life in prison with minimum parole eligibility after twenty years on each count. Chavez appealed.

On direct appeal, Chavez raised claims asserting violations of the Confrontation Clause of the Sixth Amendment, violations of Nevada's rules of evidence, a claim of

¹Respondents also argued that the petition is not properly verified, however, that issue was resolved by the subsequent filing of a proper verification. (Dkt. no. 30.)

²Unless otherwise noted, the background information for this case was taken from the exhibits filed at docket numbers 16 through 21.

1 juror misconduct, and a violation of the Eighth Amendment's prohibition against cruel
2 and unusual punishment. The Nevada Supreme Court affirmed Chavez's conviction and
3 sentence.

4 Chavez subsequently filed a proper person petition for writ of habeas corpus.
5 After appointment of counsel, Chavez filed a supplemental petition. The state court held
6 an evidentiary hearing, and then entered an order denying the state petition. Chavez
7 appealed.

8 On appeal, Chavez raised various claims of ineffective assistance of counsel,
9 and asserted a claim of cumulative error. The Nevada Supreme Court affirmed the state
10 district court's order denying the state petition.

11 On October 2, 2013, this Court received a federal habeas petition from Chavez
12 initiating this proceeding. On December 23, 2013, Chavez filed the amended petition
13 (dkt. no. 22) that is the subject of respondents' motion to dismiss.

14 **II. EXHAUSTION**

15 A federal court will not grant a state prisoner's petition for habeas relief until the
16 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*
17 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). To exhaust a ground for relief, a
18 petitioner must fairly present that ground for relief to the state's highest court, and must
19 give that court the opportunity to address and resolve it. *Duncan v. Henry*, 513 U.S.
20 364, 365 (1995); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The "fair
21 presentation" requirement is satisfied when the claim has been presented to the highest
22 state court by describing the operative facts and the legal theory upon which the federal
23 claim is based. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*, 693 F.2d
24 859, 862 (9th Cir. 1982).

25 To fairly present a federal claim to the state court, the petitioner must alert the
26 court to the fact that he asserts a claim under the United States Constitution. *Hiivala v.*
27 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing *Duncan*, 513 U.S. at 365-66). The
28 mere similarity of claims of state and federal error is insufficient to establish exhaustion.

1 *Hiivala*, 195 F.3d at 1106, (citing *Duncan*, 513 U.S. at 366); see also *Lyons v. Crawford*,
2 232 F.3d 666, 668-69 (9th Cir. 2000), as modified by, 247 F.3d 904 (9th Cir. 2001);
3 *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). The petitioner must have
4 "characterized the claims he raised in state proceedings specifically as federal claims."
5 *Lyons*, 232 F.3d at 670. This is accomplished either by referencing a specific provisions
6 of the federal constitution or by citing to either a federal or state case involving the legal
7 standard for a federal constitutional violation. *Id.*; *Peterson v. Lampert*, 319 F.3d 1153,
8 1158 (9th Cir. 2003) (en banc). "[G]eneral appeals to broad constitutional principles,
9 such as due process, equal protection, and the right to a fair trial, are insufficient to
10 establish exhaustion." *Hiivala*, 195 F.3d at 1106, (citing *Gray v. Netherland*, 518 U.S.
11 152, 162-63 (1996); see also *Shumway*, 223 F.3d at 987.

12 In Ground 2 of his petition, Chavez alleges that juror misconduct and erroneous
13 evidentiary rulings were so pervasive in his trial that they resulted in a violation of his
14 constitutional right to due process. The two primary errors Chavez identifies in Ground 2
15 are (1) the admission of evidence regarding the victim's death and (2) juror disregard for
16 the court's instructions not to deliberate on guilt prior to the completion of the case.

17 Respondents argue that Ground 2 is unexhausted because Chavez failed to
18 present these issues to the state court as federal claims for relief. With respect to
19 erroneous evidentiary rulings, respondents point to Chavez's brief on direct appeal, in
20 which Chavez argued that the trial court erred by: (1) instructing the jury that the victim
21 was deceased, rather than informing the jury that she was merely unavailable for the
22 purposes of NRS § 51.055; (2) not granting a mistrial after testimony from the victim's
23 brother suggesting that Chavez was to blame for the victim's death even though the
24 court earlier ruled that the circumstances of the death were not to be disclosed to the
25 jury; and (3) admitting autopsy photos of the victim into evidence in violation of NRS §
26 48.035(2). (Dkt. no. 19-7 at 34-38, 42-43.) In making these arguments, Chavez made
27 no specific reference to federal law. Likewise, respondents note that Chavez's argument

28 ///

1 on direct appeal regarding juror misconduct relied entirely on state case law. (*Id.* at 38-
2 39.)

3 Chavez concedes that his opening brief on direct appeal “is bereft of adequate
4 citation to the United States Constitution or federal precedent.” (Dkt. no. 31 at 3.) Even
5 so, he argues that this Court’s focus at this point should be on the likelihood that the
6 Nevada courts will consider the merits of the claim if he were to return to state court.
7 According to Chavez, the near certainty that the state court will apply state procedural
8 defaults to the claim requires this Court to find Ground 2 technically exhausted, but
9 subject to procedural default.

10 Alternatively, Chavez argues that Ground 2 was exhausted by methods other
11 than specific reference to the federal constitution or citation to a case involving the legal
12 standard for a federal constitutional violation. In this regard, he claims that factual
13 allegations contained in his direct appeal arguments combined with his ineffective
14 assistance of counsel and cumulative error claims in his state post-conviction
15 proceeding adequately apprised the Nevada Supreme Court of the federal nature of the
16 claim. He further argues that the Nevada Supreme Court applied federal law to his
17 allegations that the trial court erred by informing the jury that the victim was deceased
18 and by admitting the autopsy photos into evidence, thereby effectuating exhaustion of
19 those portions of the claim. Lastly, he contends that the Nevada Supreme Court’s
20 reliance on a Nevada case, *Valdez v. State*, 196 P.3d 465 (Nev. 2008), to deny his juror
21 misconduct claim was sufficient to exhaust that portion of Ground 2 because the court in
22 that case found a constitutional violation arising from juror misconduct.

23 None of these alternative arguments is convincing. Exhaustion requires the
24 presentation of the claim as a cohesive whole. *See Baldwin v. Reese*, 541 U.S. 27, 32
25 (2004) (“We consequently hold that ordinarily a state prisoner does not “fairly present” a
26 claim to a state court if that court must read beyond a petition or a brief (or a similar
27 document) that does not alert it to the presence of a federal claim in order to find
28 material, such as a lower court opinion in the case, that does so.”).

1 The citation to federal law that Chavez relies upon to assert the exhaustion of
 2 part of Ground 2 is a citation to a holding in a federal criminal case (*U.S. v. Accetturro*,
 3 966 F.2d 631, 637 (11th Cir. 1992)) involving the court's review of alleged trial court
 4 error. See *Chavez v. State*, 213 P.3d 476, 488 n.5 (Nev. 2009). It was not a citation that
 5 addressed the legal standard for a federal constitutional violation. Likewise, the Nevada
 6 Supreme Court did not specify that it was relying upon *Valdez* for its application of
 7 federal law, as opposed to state law. *Id.* at 489. Thus, the citation to *Valdez* did not
 8 effect exhaustion. See *Casey v. Moore*, 386 F.3d 896, 912 (9th Cir. 2004) ("Casey's
 9 citing to a state case discussing both state and federal claims, with no textual mention
 10 of a federal claim in Casey's brief on this issue, did not fairly present to the state court of
 11 appeals the federal claim now asserted in federal habeas proceedings.").

12 With regard to applying the procedural default doctrine to Ground 2, the Supreme
 13 Court has stated as follows:

14 [If state-court remedies are no longer available because the prisoner
 15 failed to comply with the deadline for seeking state-court review or for
 16 taking an appeal, those remedies are technically exhausted, . . . but
 17 exhaustion in this sense does not automatically entitle the habeas
 petitioner to litigate his or her claims in federal court. Instead, if the
 petitioner procedurally defaulted those claims, the prisoner generally is
 barred from asserting those claims in a federal habeas proceeding.

18 *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (citing *Coleman v. Thompson*, 501 U.S. 722,
 19 744-51 (1991) and *Gray*, 518 U.S. at 162). As Chavez points out, the Nevada courts are
 20 almost certain to apply a timeliness bar and/or a successive petition bar to any
 21 forthcoming attempt to present Ground 2. See NRS §§ 34.726 and 34.810. It is well
 22 established that these bars are adequate and independent state law grounds that serve
 23 to bar federal court review of claims to which they are applied, unless petitioner can
 24 demonstrate cause and prejudice to excuse the default. See *Moran v. McDaniel*, 80
 25 F.3d 1261, 1268-70 (9th Cir.1996); *Valerio v. Crawford*, 306 F.3d 742, 778 (9th Cir.
 26 2002); *Ybarra v. McDaniel*, 656 F.3d 984, 990 (9th Cir. 2011); *Loveland v. Hatcher*, 231
 27 F.3d 640, 643 (9th Cir. 2000). And, while he does not explicitly state that there is no

28 ///

1 chance that the Nevada court will excuse the defaults,³ Chavez's insistence that this
2 Court find the claim procedurally defaulted for the purposes federal review stands as a
3 concession that he is not able to make the showing necessary to obtain a hearing in
4 state court on the merits of Ground 2. Thus, Ground 2 is technically exhausted, but
5 procedurally defaulted.

6 The question then becomes whether Chavez can show cause and prejudice
7 sufficient to permit this Court to excuse the procedural defaults. See *Wainwright v.*
8 *Sykes*, 433 U.S. 72, 87 (1977). That is, he must show that some "objective factor
9 external to the defense" impeded his attempts to comply with the state procedural rule.
10 *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Further, this objective impediment must
11 have actually prevented him from raising the claim. *McCleskey v. Zant*, 499 U.S. 467,
12 497 (1991). If he can establish cause, Chavez must then show "prejudice;" i.e., that
13 there was *actual* prejudice amounting to a substantial disadvantage, and which resulted
14 in a trial infected with constitutional error. *United States v. Frady*, 456 U.S. 152, 170
15 (1982).

16 In his sur-reply to the motion to dismiss, Chavez submits that the issue of cause
17 and prejudice is to be litigated if and when this Court decides that the procedural default
18 analysis applies to Ground 2. Even so, he proffers what he terms as "one possible angle
19 for demonstrating cause and prejudice." (Dkt. no. 36 at 6.) Specifically, he argues that
20 *Martinez v. Ryan*, 132 S.Ct. 1308 (2012), provides him a viable claim of cause and
21 prejudice.

22 In *Martinez*, the Supreme Court held that, in collateral proceedings that provide
23 the first occasion to raise a claim of ineffective assistance at trial, ineffective assistance
24 of post-conviction counsel in that proceeding may establish cause for a prisoner's
25 procedural default of such a claim. *Martinez*, 132 S. Ct. at 1315. The Court stressed that
26 its holding was a "narrow exception" to the rule in *Coleman* that "an attorney's ignorance

27 ³He does note, however, that the "universe of Nevada grounds for cause to
28 excuse a procedural default are quite limited." (Dkt. no. 31 at 8 n. 5.)

1 or inadvertence in a postconviction proceeding does not qualify as cause to excuse a
2 procedural default.” *Id.*

3 In *Ha Van Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), the Ninth Circuit
4 expanded *Martinez* to allow ineffective assistance of post-conviction counsel to be used
5 as a means to excuse the default of claims of ineffective assistance of appellate
6 counsel. *Nguyen*, 736 F.3d at 1295. Then, in *Dickens v. Ryan*, 740 F.3d 1320 (9th Cir.
7 2014), the court indicated in a footnote that, unlike a claim of ineffective assistance of
8 appellate counsel as cause for failing to bring a claim on direct appeal, a claim of
9 ineffective assistance of PCR counsel as cause for failing to assert a claim of ineffective
10 assistance of trial counsel need not be first exhausted. *Dickens*, 740 F.3d at 1322, n.17.

11 Chavez suggests that, read together, these cases allow him to assert ineffective
12 assistance of direct appeal counsel as “cause to allow this Court to hear the substance
13 of [Ground 2] despite Chavez’s anticipatory default of that claim.” (Dkt. no. 36 at 9.) This
14 Court does not agree. The Supreme Court precedent remains that a claim of ineffective
15 assistance of counsel showing “cause” is itself subject to the exhaustion requirements.
16 *Murray*, 477 U.S. at 492; *Edwards v. Carpenter*, 529 U.S. 446 (2000). Because it is not
17 disputed that Chavez has not exhausted any claim that appellate counsel was
18 ineffective by not presenting Ground 2 to the state court, such a claim cannot serve as
19 cause in this Court to excuse the default of Ground 2.


20 As general matter, this Court is not inclined to extend the limits of *Martinez*
21 without clear direction from a higher court. See *Hunton v. Sinclair*, 732 F.3d 1124,
22 1126–27 (9th Cir. 2013) (declining to extend *Martinez* to underlying *Brady* claims), *cert.*
23 *denied*, 134 S.Ct. 1771 (2014); see also *Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9th
24 Cir. 2015) (declining to extend *Martinez* to cover claims other than ineffective assistance
25 of trial or appellate counsel). Nonetheless, Chavez will be allowed an opportunity to
26 present argument on the issue of whether his procedural default of Ground 2 should be
27 excused. Because he has already been provided at least one opportunity to raise such
28 argument, the time permitted will be limited.

1 It is therefore ordered that respondents' motion to dismiss for lack of exhaustion
2 (dkt. no. 26) is denied.

3 It is further ordered that petitioner will have twenty (20) days from the date this
4 order is entered within which to show why, in light of the discussion above, Ground 2
5 should not be dismissed as procedurally barred. Respondents will thereafter have
6 twenty (20) days to file a response. The matter will, at that point, be deemed submitted
7 to the Court for decision.

8 It is further ordered that respondents' motions to extend time (dkt. nos. 43 and
9 44) are granted *nunc pro tunc* as of the date of their respective filing.

10 DATED THIS 22nd day of September 2015.

11
12 
13 _____
14 MIRANDA M. DU
15 UNITED STATES DISTRICT JUDGE
16
17
18
19
20
21
22
23
24
25
26
27
28